BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHAMROCK HOMES LLC,
Petitioner,

vs.

CITY OF SPRINGFIELD
and LANE COUNTY,
Respondents,

LUBA No. 2012-077/078/079

FINAL OPINION
AND ORDER

Appeal from City of Springfield and Lane County.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner.

Stephen E. Dingle, County Counsel, and H. Andrew Clark, Assistant County Counsel, Eugene, filed a joint response brief on behalf for respondent Lane County.

Stephen L. Vorhes and Mary Bridget Smith, Springfield, filed a joint response brief and argued on behalf of respondent City of Springfield. With them on the brief was Leahy, Van Vactor, Cox & Melendy, LLP.

BASSHAM, Board Member, HOLSTUN, Board Chair, participated in the decision;

RYAN, Board Member, concurring.

REMANDED 07/12/2013

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city ordinance and two concurring county ordinances that adopt amendments to a refinement plan for the Glenwood neighborhood.

FACTS

As petitioner describes it, the Glenwood neighborhood is "in the shape of a leg of prosciutto, bordered on the north and east by the Willamette River, and on the west and south by I-5, with McVay Highway extending southward to form the shank and hock portion of the ham." Petition for Review 5. The neighborhood totals about 620 acres, and is subject to the acknowledged Glenwood Refinement Plan (GRP). A refinement plan is a comprehensive plan for a specific neighborhood or area of the city, subordinate to the Metro Plan, which is the overarching comprehensive plan for the Eugene/Springfield region. The existing GRP includes a riverfront site of approximately 52 acres that is designated for nodal development, a type of mixed-use pedestrian-friendly development pattern.

In 2008, the city initiated a new planning effort for a 267-acre area of the Glenwood neighborhood, known as Phase 1, which includes the portion that borders the river. In relevant part, Glenwood Phase 1 expands areas designated by the GRP for nodal development from 52 acres to 123 acres, and replaces existing GRP designations and Springfield Zoning Map designations with one of four new Mixed Use plan designations/zones: Residential Mixed-Use, Commercial Mixed-Use, Office Mixed-Use, and Employment Mixed-Use.

Petitioner owns an existing manufactured dwelling park on 11 acres that was formerly zoned Low Density Residential, which allowed manufactured dwelling parks, but under Phase 1 is rezoned Employment Mixed-Use, which does not allow manufactured dwelling parks.

After extensive joint and separate proceedings, the city and county adopted the challenged ordinances on June 12, 2012, and September 5, 2012, respectively. These appeals followed.

MOTION TO STRIKE

Petitioner moves to strike statements in the response brief to the effect that the city's public facilities engineering manual has been acknowledged to comply with the statewide planning goals. Petitioner disputes that claim, and argues that unless the city provides supporting evidence in the form of an acknowledgment order or similar document, LUBA should disregard the claim that the engineering manual is acknowledged.

In response, respondents provided copies of ordinances that they argue had the effect of acknowledging the engineering manual. While we reject that argument below, respondents' position on whether the engineering manual is acknowledged is in essence a legal position, not an evidentiary one, and we see no reason to strike or disregard the respondents' arguments on that point. The motion to strike is denied.

FIRST ASSIGNMENT OF ERROR

The Willamette River riparian area is a significant natural resource on the city's acknowledged resource inventory, an inventory required by Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Space). Goal 5 is implemented by OAR Chapter 660, division 023. The goal and rule generally require local governments to inventory significant natural resources, and develop a program to protect such resources against conflicting uses, based on an analysis of the economic, social, environmental, and energy (ESEE) consequences of allowing, limiting, or prohibiting conflicting uses. The rule also includes special provisions and "safe harbors" with respect to specific types of resources, such as riparian areas and wetlands. OAR 660-023-0090 and 660-023-0100. Such a safe harbor applies in lieu of the ESEE analysis process. OAR 660-023-0090(8); OAR 660-023-0100(4)(b).

After a local government's inventory and program become acknowledged, Goal 5 and the Goal 5 rule do not generally apply directly to the local government's land use decisions, unless the local government adopts a post-acknowledgment plan amendment (PAPA) that affects a Goal 5 resource. OAR 660-023-0250 specifies the circumstances that trigger Goal 5 review. In relevant part, an amendment affects a Goal 5 resource if the PAPA "amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource," or "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site."[1] A "'[c]onflicting use' is a land use * * * that could adversely affect a significant Goal 5 resource * * *. OAR 660-023-0010(1).

Where Goal 5 review is triggered under OAR 660-023-0250(3), the local government is not necessarily obligated to undertake each of the many sequential steps in the Goal 5 process. *Johnson v. Jefferson County*, 56 Or LUBA 25, 39-40, *aff'd* 221 Or App 190, 189 P3d 34 (2008); *NWDA v. City of Portland*, 50 Or LUBA 310, 338 (2005); *NWDA v. City of Portland*, 47 Or LUBA 533, 543 (2004), *rev'd on other grounds*, 198 Or App 286, 108 P3d 589 (2005); *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 443-44 (2002). Which and how many of the substantive steps in the Goal 5 decision process must be revisited, if any, and to what extent, will depend on the nature of the amendments, the existing acknowledged program, the particular Goal 5 resource and the conflicting use at

[1] OAR 660-023-0250(3) provides, in relevant part:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

issue. *Cosner v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2011-070, 2011-071 and 2011-072), January 12, 2012, slip op 14.

In the present case, petitioner contends that Glenwood Phase 1 triggers application of Goal 5 under OAR 660-023-0250(3) because it both (1) amends the city's program to protect the Willamette River riparian area, and (2) allows new uses that could be conflicting uses with the riparian area. According to petitioner, the city strengthened the regulations protecting the riparian area by requiring protection of existing native vegetation and trees within the 75-foot riparian setback. Further, petitioner argues that new uses allowed include planting of trees and native vegetation, stormwater management systems and outfalls, multi-use pedestrian or bicycle paths, and bikeways. Petitioner contends that these new uses could conflict with the riparian resource, and that the regulatory changes and new uses therefore trigger the applicability of Goal 5 and require Goal 5 review, pursuant to OAR 660-023-0250(3).

The city's findings addressing Goal 5 and the Goal 5 rule appear at Record 59-65. The findings address OAR 660-023-0250(3), which as noted governs the applicability of Goal 5 review to post-acknowledgment plan amendments. The city concluded that:

> "Springfield's riparian and wetland inventories, as discussed above, were amended under a separate PAPA, LRP2010-00002.
>
> "While the proposed [GRP] and the proposed Glenwood Riverfront Mixed-Use Plan District do discuss new uses along the Glenwood Riverfront, they will not conflict with significant Goal 5 resources because these uses will be less intense than the existing industrial and commercial uses * * *." Record 64.

Petitioner challenges the conclusion that the Phase 1 amendments will not conflict with Goal 5 resources. According to petitioner, that conclusion misses the point of OAR 660-023-0250(3), by jumping to a conclusion about whether new uses adversely affect riparian resources and thus constitute conflicting uses, in order to avoid conducting the required Goal 5 analysis necessary to evaluate conflicting uses. Petitioner argues that

because Glenwood Phase 1 modified the regulations that protect the Willamette River riparian area, and rezoned riverfront property to allow new uses, Goal 5 is therefore triggered, and the city erred in failing to conduct a Goal 5 analysis.

Petitioner apparently understands the above-quoted finding under OAR 660-023-0250(3) to conclude that no Goal 5 review is required, because Glenwood Phase 1 does not allow "new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list" within the meaning of OAR 660-023-0250(3)(b). However, that is not an accurate understanding of that finding or the city's findings regarding compliance with Goal 5.

The city's ultimate conclusion regarding Goal 5 is that "Glenwood Phase 1 is consistent with Goal 5 because all applicable OARs implementing the Goal have been addressed and riparian and wetland inventories within the Glenwood Phase 1 boundaries have been updated." Record 65. The city in fact adopted findings that address a number of Goal 5 rule requirements, including OAR 660-023-0090, which is the rule that is concerned with riparian areas.[2] The findings also discuss impacts to the Willamette River frontage in addressing OAR 660-023-0100, the Goal 5 rule that concerns wetlands.[3] Petitioner does not

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[2] The findings addressing OAR 660-023-0090 state, in relevant part:

> "All new development/redevelopment in Glenwood Phase 1, as well as the rest of Glenwood, will require compliance with the riparian policies and implementation strategies in the updated Glenwood Refinement Plan and the existing and amended standards contained in the SDC [Springfield Development Code]. * * *" Record 60.

[3] The findings addressing OAR 660-023-0100 state, as relevant:

> "Glenwood Phase 1 properties abutting the Willamette River have been planned and zoned for intensive urban development and use prior to Metro Plan acknowledgement in 1982. Currently, these properties are developed with a mix of residential, commercial, and industrial uses, many of which have no formal drainage system for treatment of storm water. Several uses are developed up to the top of the bank, with little apparent setback. Adoption of Glenwood Phase 1 will require new and redevelopment sites to meet all required riparian and wetland setbacks.
>
> "All new development/redevelopment in Glenwood Phase 1, as well as the rest of Glenwood, will require compliance with the wetland policies and implementation strategies in the updated

acknowledge or challenge these findings, or explain in the petition for review what it believes is missing from the city's analysis under the Goal 5 rule. At oral argument, petitioner suggested that the city should have conducted a new ESEE analysis.

However, as noted above, to what extent the local government must revisit the substantive steps of the Goal 5 process, including the ESEE and program development processes set out in OAR 660-018-0040 and 660-018-0050, depends on the nature of the amendments, the existing acknowledged program, the particular Goal 5 resource and the conflicting use at issue. *Cosner*, slip op 14. A PAPA that makes only minor changes to the program or the uses allowed may require little or no ESEE analysis or other analysis under the Goal 5 rule. Petitioner does not explain why the changes made in the present case warrant even a limited ESEE analysis. The only change to the regulatory program identified by petitioner, preservation of existing native riparian vegetation within the existing 75-foot setback, seems entirely consistent with the Goal 5 safe harbor provisions for riparian areas. OAR 660-023-0090(8)(b). Similarly, the new uses identified by petitioner all appear to be the kind of public facilities that are allowed in riparian areas under the safe harbor provisions of OAR 660-023-0090(8)(a) (allowing streets, roads, paths, drainage facilities, etc., in riparian areas). As noted, the Goal 5 safe harbor provisions apply in lieu of the standard ESEE process.

Absent a more developed challenge, petitioner has not established that the city erred in failing to conduct an ESEE analysis or a more extensive Goal 5 analysis under the Goal 5 rule.

The first assignment of error is denied.

Glenwood Refinement Plan and the existing and amended standards contained in the SDC." Record 61.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that Glenwood Phase 1 is inconsistent with the Springfield 2030 Refinement Plan. According to petitioner, the Springfield 2030 Refinement Plan contemplates that seven acres of land intended for park or open space use will be designated high-density residential to provide recreational space for residents of an additional 21 acres of high-density residential development required under the city's housing inventory. Petitioner argues that, while the city identified seven acres of park and open space, the city did not apply the high-density residential plan designation to those seven acres, but instead applied other plan designations. Doing so is inconsistent with the Springfield 2030 Plan, petitioner contends, and therefore the decision violates Statewide Planning Goal 2 (Land Use Planning), which requires that adopted plans be consistent. [4]

The city responds, and we agree, that the Springfield 2030 Plan does not *require* that seven acres of land for park and open space land be designated high-density residential, as opposed to other plan designations. The relevant language is quoted in the city's findings:

> "The need for park land to support the proposed residential area (Subarea A) was identified in the *Springfield Residential Land and Housing Needs Analysis* page 71. The results of the analysis indicated that since no surplus of land designated for high density residential uses existed in Springfield, the 21 acre high density plan designation deficit needed to be increased by at least 7 acres to provide parkland/open space immediately adjacent to the proposed high density residential district in Glenwood. This parkland need is addressed in Finding 11 of the Springfield 2030 Refinement Plan Residential Land Use and Housing Element: '* * * *The High Density Residential designation has a deficit of approximately 28 gross acres. At a minimum, the City will meet the high density residential land deficit of 28 acres (including 7 acres of HDR designated land to provide public open space for the higher density development, as well as any needed public facilities) through its redevelopment strategies in Glenwood.*'" Record 71 (italics in original).

[4] Petitioner initially couches this assignment of error as a violation of Statewide Planning Goal 8 (Recreation), but does not explain why Goal 8 is concerned with whether lands intended for park and open space uses are designated high-density residential, as opposed to other plan designations. The focus of petitioner's argument is on consistency with the Springfield 2030 Plan, which is a Goal 2 issue.

The italicized quote from the Springfield 2030 Refinement Plan in the findings above indicates a need for at least 28 gross acres designated high-density residential, including at least seven acres of land to provide park space for residents of the 21 acres of land that is required for high-density residential use. The city points out that Glenwood Phase 1 actually designates a total of 33.26 gross acres for high-density residential use, well above the minimum 28 gross acres called for in the Springfield 2030 Refinement Plan. The city argues that the 12 surplus acres above the minimum 21 acres needed for high-density residential development are potentially available for park and open space uses, in addition to the seven acres identified in the Glenwood Phase 1 decision.

We agree with the city that while the Springfield 2030 Plan assumed that seven acres of land for park and open space would be designated high-density residential, neither the Plan nor any other plan language cited to us *requires* that seven acres of land for park and open space be designated high-residential density, as opposed to another plan designation, as long as the minimum seven acres is supplied. Indeed, we understand the city's findings and language in the GRP to indicate that the intent is to eventually designate all park and open space in the GRP, including the identified seven acres, as Public/Semi-public. Record 72, 300. That does not suggest that the assumption in the Springfield 2030 Refinement Plan that the seven park acres would be designated high-density residential carries any particular planning significance. The Glenwood Phase 1 actually designated 33.26 acres for high-density residential, which exceeds the combined 28 gross acres required for residential and park/open space uses. Even without the additional seven acres specifically identified for park and open space uses, Glenwood Phase 1 appears to meet both the intent and the literal language of the above-quoted finding from the Springfield 2030 Refinement Plan. Petitioner has not demonstrated any necessary inconsistency between the Springfield 2030 Refinement Plan and Glenwood Phase 1.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends that the city violated Statewide Planning Goals 2 and 9 (Economic Development) by relying upon an unacknowledged economic opportunities analysis (EOA), adopted in 2010, to conclude that the new plan designations adopted under the Glenwood Phase 1 are consistent with Goal 9.

One of the purposes of Goal 2 is to "establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions." Goal 2 requires that land use actions be consistent with comprehensive plans, and that such plans be the basis for implementing measures, such as zoning ordinances.

Goal 9 requires in relevant part that comprehensive plans must provide for "an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses[.]" OAR chapter 660, division 009 implements Goal 9. OAR 660-009-0015 requires local governments to "review and, as necessary, amend their comprehensive plans to provide economic opportunities analyses" that among other things "compare the demand for land for industrial and other employment uses to the existing supply of such land." OAR 660-009-0010(4) provides that a post-acknowledgment plan amendment that changes the plan designation of land in excess of two acres from an industrial or employment use designation to a non-industrial or other designation must address the requirements of the Goal 9 rule. OAR 660-009-0010(4) specifies that one option for doing so is to "[d]emonstrate that the proposed amendment is consistent with its most recent economic opportunities analysis and the parts of its acknowledged comprehensive plan which address the requirements of this division[.]"

A. Unacknowledged Economic Opportunities Analysis

Glenwood Phase 1 replaces all former plan designations with a new set of plan designations. Formerly, approximately 215 acres were designated for a mix of industrial and

employment uses. Under Glenwood Phase 1, approximately 224 acres are designated for industrial or employment uses. Record 77. The city adopted findings, at Record 72-83, that address Goal 9 and the Goal 9 rule, and conclude that Glenwood Phase 1 is consistent with the Goal and rule. In doing so, the findings cite and rely almost exclusively on the city's most recent economic opportunities analysis, adopted by resolution in 2010, known as the Springfield Commercial and Buildable Land Inventory and Economic Opportunities Analysis (CIBL/EOA).

The city's economic planning has a complicated history. Until recently, the city shared an urban growth boundary with the City of Eugene, and much of the city's planning was integrated into that of the larger urban region. In 1993 the cities jointly adopted an inventory of economic lands within the joint UGB. In 2007, the legislature authorized Springfield to establish its own urban growth boundary (UGB). As part of the process of establishing its own UGB, the city initiated a study of its commercial and industrial lands that resulted in the CIBL/EOA, which was adopted by resolution in January 2010. The CIBL/EOA was used to establish the City of Springfield's UGB in 2010. However, the CIBL/EOA has not yet been incorporated into the city's comprehensive plan, or acknowledged. The city's findings state that a "final decision" on the CIBL/EOA will be made when the document is incorporated into the Springfield 2030 Refinement Plan, which is a refinement plan of the Eugene-Springfield Metro Plan, the overarching comprehensive plan for the metropolitan region. Record 73-74.

Petitioner contends that the city erred in relying primarily upon the unacknowledged CIBL/EOA to conclude that Glenwood Phase 1 is consistent with Goal 9 and the Goal 9 rule. Citing *Gunderson, LLC v. City of Portland*, 62 Or LUBA 403, *rev'd in part and remanded*, 243 Or App 612, 259 P3d 1007 (2011), *aff'd* 352 Or 648, 290 P3d 803 (2012), petitioner argues that primary reliance on the unacknowledged CIBL/EOA is inconsistent with the Goal

2 requirement that land use decisions be based on the city's acknowledged comprehensive plan.

Respondents argue that the CIBL/EOA was adopted by the city council in January 2010, and used as part of a post-acknowledgment plan amendment process, and is therefore an acknowledged planning document. If we understand respondents correctly, they argue that the city relied upon a version of CIBL/EOA in adopting the city's UGB in 2010, which was adopted pursuant to the post-acknowledgment plan amendment process. However, we do not understand respondents to contend that the CIBL/EOA was itself adopted as part of that post-acknowledgment plan amendment process. To the extent respondents contend that using the CIBL/EOA to support the UGB decision means that the CIBL/EOA is an acknowledged planning document, we disagree. Respondents do not dispute that the 2010 CIBL/EOA was adopted by resolution, not ordinance, and that the city's own findings state that a "final decision" on the CIBL/EOA will be made when it is incorporated into the Springfield 2030 Refinement Plan, an incorporation that will necessarily be accomplished by ordinance and which will presumably comply with post-acknowledgment plan procedures. As far as we can tell or respondents have demonstrated, the CIBL/EOA was not adopted as part of the 2010 UGB decision, and is not an acknowledged planning document. Therefore, if the city must necessarily rely upon the CIBL/EOA in order to demonstrate compliance with Goal 9 or the Goal 9 rule—that is, consistency cannot be demonstrated by reference to the city's acknowledged Goal 9 documents—then we agree with petitioner that the city erred in relying upon the CIBL/EOA to demonstrate compliance with Goal 9 and the Goal 9 rule.

We understand respondents to argue that the findings addressing compliance with Goal 9 and the Goal 9 rule also rely upon the city's older acknowledged economic opportunities analysis and its Goal 9 comprehensive plan elements. If that is the case, and the city cited to the more recent CIBL/EOA only to *confirm* its conclusion based on the acknowledged EOA or Goal 9 comprehensive plan elements that Goal 9 is satisfied, then we

see no error in such an approach. However, respondents offer no record citations to support that claim, and our review of the city's Goal 9 findings suggests that the city relied largely if not entirely on the CIBL/EOA to demonstrate compliance with Goal 9 and the Goal 9 rule. There is little or no discussion of the city's acknowledged EOA or its Goal 9 comprehensive plan elements, and nothing cited to us indicating that the city relied on those acknowledged elements to address whether the city retains an "adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses." Remand is necessary for the city to demonstrate compliance with Goal 9 and the Goal 9 rule based on an acknowledged EOA and inventory.

This sub-assignment of error is sustained.

B. Goal 9 Inventory

As explained more fully under the fourth assignment of error addressing Goal 10, the challenged decision adopts code requirements that arguably subject development within portions of Glenwood Phase 1 to site design review under Springfield Development Code (SDC) 5.17. Petitioner contends that the site design review standards at SDC 5.17 are not clear and objective and require the city to exercise discretion in approving or denying proposed commercial and industrial development. Petitioner cites to *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995), for the proposition that subjecting lands zoned for commercial and industrial development to discretionary approval standards or standards and conditions that are not clear and objective means that such lands cannot be included in the city's Goal 9 inventory of commercial and industrial lands.

In *Opus*, the city rezoned commercial and industrial lands to new mixed-use zones that allowed residential development as permitted uses. In *Opus*, the city also subjected commercial and industrial development to new site design review standards that required, among other things, compatibility with residential uses. In other words, the amendments at issue in *Opus* converted Goal 9 inventoried commercial and industrial lands into lands where

commercial and industrial uses were subordinate to residential uses. We held in that context that the city was required to address whether it remained in compliance with the Goal 9 requirement for an adequate inventory of commercial and industrial sites. 28 Or LUBA at 691. *See also Gunderson v. City of Portland*, 62 Or LUBA at 42 (new site design review vegetation requirements that remove land for potential industrial development requires an evaluation of adequacy of the city's Goal 9 inventory).

Citing *Opus*, petitioner argues that application of the SDC 5.17 site design review standards to inventoried commercial and industrial lands violates Goal 9, because it applies discretionary or unclear and subjective standards to Goal 9 uses. According to petitioner, subjecting commercial and industrial lands to discretionary or unclear and subjective standards means that such lands are effectively removed from the inventory of land available for commercial and industrial development, thus triggering the obligation for the city to evaluate whether its inventory remains in compliance with the Goal 9 requirement for an adequate supply of sites for a variety of industrial and commercial uses.

We rejected a similar argument in *McDougal Bros. Investments v. City of Veneta*, 59 Or LUBA 207, 215 (2010):

> "Petitioners seriously misread *Home Builders Assoc* [*v. City of Eugene*, 41 Or LUBA 370, 444 (2002)] and *Opus*. While it is true that under ORS 197.307(6), Statewide Planning Goal 10 (Housing) and OAR 660-008-0015 any approval standards that are applied to needed housing must be clear and objective, there is no corresponding statutory, goal or rule requirement that commercial and industrial development may only be subject to clear and objective standards. *Home Builders Assoc*. and *Opus* do not stand for the principle that lands that are included in a local government's Goal 9 inventory of buildable lands for commercial and industrial development may not be subject to discretionary permit approval standards. Those cases simply hold that where a local government amends its comprehensive plan and land use regulations in ways that may call the assumptions that underlie its Goal 9 inventory into question, the local government must consider whether its Goal 9 inventory will remain adequate after the amendments are adopted."

In the present case, petitioner has not demonstrated that applying the site design review standards at SDC 5.17 to inventoried commercial or industrial lands calls into

question the assumptions that underlie the city's Goal 9 inventory. In our view, amendments that adopt new site design or similar development standards for commercial or industrial uses certainly could trigger the obligation for the city to evaluate the adequacy of its Goal 9 inventory if (1) the amendments physically reduce the acreage of land in the Goal 9 inventory (*e.g.* by increasing required setbacks) or (2) the amendments threaten to convert lands inventoried for Goal 9 uses to uses not protected by Goal 9. *See West Hills Development Co. v. Washington County*, 37 Or LUBA 46, 58 (1999) (distinguishing *Opus*, and concluding that imposing new standards on housing development does not trigger the obligation to evaluate the adequacy of the housing inventory, where the standards do not reduce the supply of land within the inventory or limit uses in a way that threatens to convert the land to uses not protected by the goal). As we explained in *McDougal Bros.*, the key is whether the amendment affects one or more of the assumptions that underlie the Goal 9 inventory so that the Goal 9 inventory may be rendered inadequate.

We discuss below under the fourth assignment of error the site design review standards at SDC 5.17. For present purposes, petitioner does not argue, and has not established, that to the extent adoption of Glenwood Phase 1 involves the application of SDC 5.17 that SDC 5.17 physically reduces the acreage of land in the city's Goal 9 inventory or threatens to convert lands in the Goal 9 inventory to non-Goal 9 uses.

This sub-assignment of error is denied.

C. Minimum Development Area

SDC 3.4-265, a new regulation that governs development in the Glenwood Riverfront Mixed Use Plan District, imposes a five-acre minimum development area. Petitioner argues that SDC 3.4-265 will force developers who control less than five acres to assemble adjoining parcels. Further, in Sub-Area D, SDC 3.4-265 provides that for lots or parcels larger than 5 acres, land divisions will not be permitted until a final site plan or master plan application is approved. This requirement is apparently an attempt to prevent parcelization

inconsistent with the five-acre minimum development area. However, petitioner argues that it will likely thwart that purpose, by making it more difficult to obtain divisions of larger property necessary to assemble smaller parcels to meet the five-acre minimum.

Petitioner argues that the only stated justification for the SDC 3.4-265 minimum development area is found in a footnote to SDC 3.4-265. That footnote states in relevant part that the minimum development area is necessary "for compliance with Springfield Commercial and Industrial Buildable Lands Inventory, Economic Opportunities Analysis, and Economic Development Objectives and Implementation Strategies findings." Record 394. However, petitioner repeats its earlier arguments that the city cannot rely upon the CIBL/EOA as the sole basis for the new minimum development area limitation, because the CIBL/EOA is not an acknowledged planning document.

For the reasons set out above, respondents have not established that the CIBL/EOA is an acknowledged document. If reliance on the CIBL/EOA is necessary to demonstrate consistency with Goal 9 or the Goal 9 rule, then the city erred in relying on the CIBL/EOA to justify the minimum development area standard rather than the city's acknowledged EOA. The footnote to SDC 3.4-265 justifies the minimum development area solely with reference to the CIBL/EOA. That is inconsistent with Goal 2.

This sub-assignment of error is sustained.

D. Short-Term Supply

The Goal 9 rule at OAR 660-009-0025(3) requires that at least 25 percent of the Goal 9 land supply in the UGB qualify as "short-term supply," that is, land that is ready for construction within one year of a development application. The city's findings addressing OAR 660-009-0025(3) quote and rely exclusively on the unacknowledged CIBL/EOA, specifically a statement in the CIBL/EAO that over 85 percent of the Goal 9 land inventory is considered short-term supply. Record 81. Petitioner argues, and we agree, that that exclusive

reliance on the unacknowledged CIBL/EOA is inconsistent with Goal 2. This sub-assignment of error is sustained.

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city's decision violates Statewide Planning Goal 10 (Housing), the Goal 10 rule, and comprehensive plan policies related to housing.

A. Metro Plan Housing Policy A.25

Metro Plan Housing Policy A.25 provides:

> "Conserve the metropolitan area's supply of existing affordable housing and increase the stability and quality of older residential neighborhoods, through measures such as revitalization; code enforcement; *appropriate zoning*; rehabilitation programs; relocation of existing structures; traffic calming; parking requirements; or public safety considerations. These actions should support planned densities in these areas." (Emphasis added).

The city adopted two pages of findings addressing Policy A.25. Petitioner challenges those findings, arguing that the findings do not establish that Glenwood Phase 1 is consistent with Policy A.25's mandate to conserve the supply of existing affordable housing. According to petitioner, the city's findings instead demonstrate that Glenwood Phase 1 will instead reduce existing affordable housing, by making existing affordable housing such as petitioner's manufactured dwelling park nonconforming uses in the new zones, and encouraging the redevelopment of existing manufactured dwelling parks into employment and high-density residential uses.

1. Conserving Existing Manufactured Dwelling Parks

The challenged decision adds the following language to the GRP's Housing and Economic Development Chapter:

> "At the time this Plan was prepared, over 60% of Glenwood's housing stock was comprised of travel trailers, mobile homes, and other manufactured dwelling units, many of which are located in the Glenwood Riverfront. Given the age, variety, and limited durability of these types of units, manufactured home park owners in the Glenwood Riverfront will face increased pressure to

> redevelop their land for more valuable mixed uses. Further, most of the manufactured home parks in the Glenwood Riverfront are served by aging and marginal onsite septic systems. As these systems fail, owners will face considerable expense to annex and connect to the public wastewater system. These costs may factor into owners' decisions to close existing manufactured home parks." GRP 116.

The city's findings addressing Policy A.25 quote the above new refinement plan language, and then in 10 paragraphs attempt to explain why the proposed new zoning, which will make all manufactured dwelling parks in Glenwood nonconforming uses, is consistent with Policy A.25.[5] The gist of the city's reasoning appears to be that (1) the city must balance

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[5] The findings state, in relevant part:

> "Glenwood is just one portion of the metropolitan area and one portion of Springfield. However, for Glenwood Phase 1, conserving the existing affordable housing is a conundrum, a balancing act between preserving this type of housing and providing sites for new centrally-located multi-family housing and employment opportunities. Glenwood Phase 1 assists in the revitalization of Glenwood by providing plans for housing, jobs and infrastructure that will bring this district up to appropriate urban standards. As land within Phase 1 is annexed and developed, the City will be able to use CDGB and HOME funding to support construction of housing units for low and moderate income persons.
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> "Subarea A, which is planned for residential mixed-use development, will provide at least 1100 residential dwelling units at a minimum density of at least 50 dwelling units per net acre as part of a new pedestrian-friendly residential neighborhood in the Franklin Riverfront. * * * Subarea A currently contains the Ponderosa Mobile Home park with 49 units on approximately 7 acres of land, which equates to a density of 7 dwelling units per net acre. The park is currently designated Mixed Use/Nodal Development and zoned Community Commercial and, therefore, is currently a pre-existing non-conforming use as specified in SDC Section 5.8-100.
>
> "Subarea D, which is planned for employment mixed-use, currently contains 6 mobile home parks with 375 units on approximately 34 acres of land, which equates to a density of just over 11 dwelling units per net acre. The parks are currently designated Mixed Use/Nodal Development Area, Commercial/Industrial/Multi-Family Mixed Use or Low Density Residential and zoned Low Density Residential. Only the parks and park land on the west side of McVay Highway that are designated and zoned Low Density Residential are currently conforming. The parks on the east side of McVay Highway are currently pre-existing non-conforming uses.
>
> "The proposed residential density of 50 dwelling units per net acre in Subarea A vastly exceeds the existing residential densities in the existing mobile home parks.
>
> "Redesignating and rezoning these parks to Residential Mixed-Use in Subarea A and Employment Mixed-Use in Subarea D will eliminate a number of Plan/Zone conflicts and will make all of the parks non-conforming uses. Nevertheless, the parks may remain a 'pre-existing non-conforming use' as specified in SDC Section 5.8-100, until such time as the park

conservation of existing affordable housing with the need for higher-density urban employment and residential development, (2) the existing parks are low density, and some of them are already non-conforming uses, and (3) zoning all parks to become non-conforming uses does not offend Policy A.25, because the existing parks may continue until the park owners decide to redevelop, at which time the city will attempt to obtain funds to support construction of housing units for low and moderate income persons.

Petitioner argues that the findings addressing Policy A.25 do not, individually or cumulatively, make the case that rendering all existing parks non-conforming uses is consistent with Policy A.25. According to petitioner, making the parks non-conforming uses is a big step in the direction of eventually eliminating those parks altogether. Petitioner contends that the policy requires the city to "conserve" existing affordable housing, not make it easier to redevelop existing affordable housing.

Respondents argue that the city is required to balance the need for affordable housing with the community goal of maintaining a compact urban form, as expressed in Metro Plan Policy A.30, which requires the city to "[b]alance the need to provide a sufficient amount of land to accommodate affordable housing with the community's goal to maintain a compact urban form." According to respondents, the city has balanced those needs and made the ultimate policy choice to provide for higher-density urban development, even if that means making all existing manufactured dwelling parks non-conforming uses. Respondents argue that doing so is consistent with Policy A.30, because the parks are under economic pressure to redevelop anyway, and the amendments allow the parks to continue as nonconforming uses

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> owner decides to redevelop or sell. At that time, the park owner must comply with ORS 90.645 regarding park closures and payments * * *.
>
> "* * * * *
>
> "Springfield has programs to conserve the metropolitan area's supply of existing affordable housing as long as possible and support State regulations and provide local programs to aid residents of the existing non-conforming mobile home parks. * * *" Record 144-46 (underline in original).

until the time the owners decide to redevelop. Respondents argue that there is no evidence that leaving the existing parks zoned for low density residential development would change the eventual fate of any manufactured dwelling park, given the economic and other disincentives to their long-term existence.

We generally agree with respondents that the city is not required to consider Policy A.25 in isolation from other applicable policies, and it is possible the city could conclude, after balancing all applicable policy requirements, that making the existing manufactured dwelling parks non-conforming uses is an acceptable sacrifice to give as much effect as possible to all applicable comprehensive plan policy objectives. The problem is that it is not clear to us what other applicable comprehensive plan policies the city considered on this point. The city's findings do not expressly consider Policy A.30 at all, the policy cited in the respondents' brief. Respondents do not cite to any other comprehensive plan policy or language that would support a conclusion that making manufactured dwelling parks non-conforming uses is, on balance, consistent with all applicable policies, including Policy A.25. Remand is necessary for the city to adopt a more adequate explanation for why making existing manufactured dwelling parks non-conforming uses is consistent with Policy A.25, considered in context with all applicable plan policies.

2. Low Density Residential Zoning for Manufactured Dwelling Parks

The GRP prior to the Glenwood Phase 1 amendments included two sub-area policies directed at manufactured dwelling parks. One policy, the Sub-area 9, McVay Mixed-Use Area required "appropriate zoning" within the sub-area, including a policy to "[a]llow manufactured dwelling parks to have Low Density Residential zoning." The second policy provided that the sub-area shall be considered appropriate for recreational vehicle use and required the city to "[c]ontinue to allow RVs [recreational vehicles] to replace RVs and manufactured dwellings in existing manufactured dwelling parks that contain RVs". Both of the above sub-area policies were deleted in Glenwood Phase 1.

Petitioner contends that both deleted GRP policies were intended to implement Metro Policy A.25's mandate to conserve existing affordable housing, and that the findings and record do not establish that their deletion is consistent with Policy A.25.

The city's findings do not explain the justification for deleting the above-quoted policy language, and respondents do not cite to anything in the record that explains the deletion. Respondents do not dispute that the two sub-area policies are intended to implement Metro Policy A.25, but argue that the findings addressing Policy A.25 are sufficient to explain the deletions. However, we held above that those findings are inadequate. Therefore, remand is also necessary under this sub-assignment of error for the city to establish that deletion of the two sub-area policies is consistent with Policy A.25.

B. Needed Housing and Clear and Objective Standards

ORS 197.307(4) provides that:

> "Except as provided in [ORS 197.307(6)], a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing, on buildable land described in [ORS 197.307(3)]. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

See also OAR 660-008-0015(1) (similar requirement in the administrative rule implementing Goal 10). ORS 197.307(6) provides that a local government may apply standards that are not clear and objective to regulate the appearance and aesthetics of needed housing, if the land owner has the option to proceed under clear and objective standards. Thus, a local government may have two alternative needed housing tracks: one that uses only clear and objective standards, and one that does not.

In relevant part, the challenged decision adopts a new SDC section, SDC 3.4-215, governing the new Glenwood Riverfront Mixed-Use Plan District. SDC 3.4-215 provides that "required applications" within the Glenwood Riverfront Mixed Use Plan designation are subject to a number of SDC chapter 5 sections, including "Site Plan Review." SDC 3.4-

215(B).[6] Petitioner contends that site plan review under SDC 5.17 includes approval standards that are not clear and objective, and that the city does not have a two-track system with the option for a track subject only to clear and objective standards. According to petitioner, subjecting needed housing such as multi-family housing to site design review standards that are not clear and objective violates ORS 197.307(4) and the Goal 10 mandate that local governments apply only clear and objective standards to needed housing.[7]

Petitioner incorporates into this sub-assignment of error its discussion of selected site plan review standards in the fourth assignment of error, addressing Goal 9 compliance. There, petitioner lists a number of site design review standards and authorizations for conditions that, petitioner argues, are not clear and objective. SDC 5.17-125 lists five approval standards. The only standard petitioner focuses on is SDC 5.17-125(D), which requires a finding that:

> "Parking areas and ingress-egress points have been designed to: facilitate vehicular traffic, bicycle and pedestrian safety to avoid congestion; provide connectivity within the development area and to adjacent residential areas, transit stops, neighborhood activity centers, and commercial, industrial and public areas; minimize driveways on arterial and collector streets as specified in this Code or other applicable regulations and comply with the ODOT access management standards for State highways."

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[6] SDC 3.4-215(B) is a new SDC provision that provides, in relevant part:

> "All required applications in the Glenwood Riverfront Mixed-Use Plan District shall be reviewed as specified in Chapter 5 including, but not limited to: Annexations; Master Plans; the Willamette Greenway Overlay District; the Urbanizable Fringe Overlay District; the Floodplain Overlay District; the Hillside Development Overlay District; the Historic Overlay District, as applicable; Site Plan Review; and Land Divisions."

[7] Petitioner also argues that, if the city applies needed housing site design review standards that are not clear and objective, the city cannot count any lands subject to such standards toward its Goal 10 inventory of buildable lands. Petition for Review 37. We do not understand the argument. If the city adopts unclear or subjective standards for needed housing, or it applies unclear or subjective standards to approve or deny needed housing, doing so may violate ORS 197.307(4), but that violation would not affect the city's acknowledged inventory of buildable land required under Goal 10 and ORS 197.296. The apparent source of authority for that argument is *Opus*, which was a Goal 9 case, involving distinguishable circumstances. Earlier in this opinion, we rejected petitioner's overreliance on *Opus* with respect to Goal 9 issues, and here we reject petitioner's attempt to overextend *Opus* to ORS 197.307(4) issues.

The prefatory language to SDC 5.17-125 states that "[i]f conditions cannot be attached to satisfy the approval criteria, the Director shall deny the application." SDC 5.17-130 authorizes the Director to impose conditions on site design review approval, providing:

> "To the extent necessary to satisfy the approval criteria of Section 5.17-125, comply with all applicable provisions of this Code *and to mitigate identified negative impacts to surrounding properties*, the Director may impose approval conditions. Conditions imposed to satisfy the Site Plan application approval criteria shall not be used to exclude 'needed housing' as defined in OAR 660-08-0015. All conditions shall be satisfied prior to Final Site Plan approval. Approval conditions may include, but are not limited to [listing examples]." (Emphasis added).

Petitioner focuses on the emphasized language above, arguing that its broad authorization to impose conditions based on "negative impacts to surrounding properties" is neither clear nor objective. Petitioner also challenges some of the listed types of conditions, for example SDC 5.17-130(F), which authorizes the director to limit the hours of operation "whenever a land use conflict is identified" including, but not limited to, "noise and traffic generation."

Respondents argue that the site design review provisions cited by petitioner are clear and objective, because they do not involve "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development." *Rogue Valley Association of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999). However, we tend to agree with petitioner that at least the above-quoted site design standards and authorized conditions are not "clear and objective" within the meaning of ORS 197.307(4). In particular, SDC 5.17-130 appears to grant broad authority for the planning director to impose any conditions deemed necessary to mitigate the impacts of development on surrounding properties. SDC 5.17-130 does provide that "[c]onditions imposed to satisfy the Site Plan application approval criteria shall not be used to exclude 'needed housing' as defined in OAR 660-008-0015." However, that language appears to preclude only denial of a site plan review application for needed housing, and does not preclude approval with

conditions based on subjective evaluations of "negative impacts" to surrounding property and attempts to mitigate such impacts.

However, the difficulty with petitioner's needed housing challenge to SDC 5.17 is that the challenged decision itself does not adopt or amend the site design review standards at SDC 5.17, and those provisions are not directly before us in this review. Instead, in relevant part the challenged ordinances adopt code language providing that "required applications" within the Glenwood Riverfront Mixed-Use Plan designation are subject to a number of SDC chapter 5 sections, including "Site Plan Review." SDC 3.4-215(B). *See* n 6. However, it is not clear that SDC 3.4-215(B) or anything in the Glenwood Phase 1 amendments imposes any new or additional site design review requirements, or even extends existing site design review requirements to new types of residential development.

Instead, the applicability of site design review appears to be exclusively governed by SDC 5.17-105, entitled "Purpose and Applicability." SDC 5.17-105(B) specifies the types of development that requires site design review, including "[m]ultifamily residential." In other words, if site design review applies to multifamily residential development within the Glenwood Riverfront Mixed-Use Plan designation, it is because SDC 5.17-105(B) has so provided and continues to provide, and not because the challenged decision itself adopts code provisions or plan language that subjects such development, for the first time, to site design review.

ORS 197.307(4) requires local governments to "adopt and apply only clear and objective standards, conditions and procedures" to needed housing. The decision clearly does not "adopt" SDC 5.17, and it is debatable whether the decision "appl[ies]" any of the SDC 5.17 standards, conditions or procedures within the meaning of ORS 197.307(4). As far as petitioner has established, the only substantive change the challenged decision makes with respect to the applicability of site design review standards at SDC 5.17 is to adopt SDC 3.4-215(B). However, SDC 3.4-215(B) simply acknowledges that development within the

Glenwood Riverfront Mixed-Use Plan designation is potentially subject to a number of different review standards, including site design review.

In our view, if SDC 5.17 includes provisions that violate ORS 197.307(4), then such violations can be challenged only in an appeal of a decision that amends or applies SDC 5.17. Such alleged violations cannot be challenged in an appeal of a refinement plan and associated code provisions that neither adopt nor apply SDC 5.17, and at best only acknowledge that SDC 5.17 may apply to development within the planning area. Accordingly, petitioner's arguments under this sub-assignment of error do not provide a basis to reverse or remand the decisions challenged in these appeals.

C. Housing Inventory and Public Facilities

As noted, Glenwood Phase 1 designates at least 28 acres for high-density residential development. Petitioner argues in the fifth assignment of error that the city's decision fails to comply with Statewide Planning Goal 11 (Public Facilities). Under this sub-assignment of error, petitioner incorporates those arguments and contends that the city cannot count the 28 acres of land zoned for high density residential use as part of its Goal 10 inventory of buildable lands, unless the city has provided the public facilities planning necessary to support those residential uses.

Assuming without deciding that there is some shortcoming in the city's Goal 11 public facilities planning, or mismatch between the city's Goal 10 inventory and its public facilities planning, such a shortcoming or mismatch might constitute a violation of Goal 11, but petitioner has not demonstrated that it also constitutes a problem with the city's Goal 10 inventory of buildable lands. Petitioner contends that it is "inherent" in Goal 10 that all lands included in the Goal 10 inventory, *i.e.* lands that are suitable, available and necessary for residential uses, must be supported by adequate Goal 11 public facilities planning. We agree that Goals 10 and 11 share overlapping policy concerns, and are intended to work together to accomplish their respective policy objectives. However, that does not mean that Goal 10

includes obligations separate and independent from Goal 11 to provide for public facilities planning, or that there is a strict concurrency requirement inherent in the goals, such that a local government cannot update its Goal 10 inventory unless and until it has updated its Goal 11 public facilities plans, and vice versa.

In any case, below we reject petitioner's Goal 11 challenges to the city's decision. Accordingly, petitioner's arguments under this sub-assignment of error do not provide a basis for reversal or remand.

D. Five-Acre Minimum Development Area

ORS 197.307(4) and Goal 10 provide that "standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." Under this sub-assignment of error, petitioner argues that the five-acre minimum development area required under SDC 3.4-265 will discourage needed housing through unreasonable cost and delay. According to petitioner, owners of small parcels will need time to assemble other small parcels to reach the five-acre minimum, noting that the average lot size in the GRP is 0.87 acres, which means a lot of assembling. Further, petitioner argues that SDC 3.4-265 will increase the cost of needed housing, because it will increase the value of land adjacent to small parcels that are needed to reach the minimum.

Respondents argue that petitioner fails to recognize the exception set out in a footnote to SDC 3.4-265, which provides if the developer submits a letter stating that abutting property owners are not willing to participate in the assembly of a minimum 5-acre development area then the five-acre minimum does not apply. With that exception, respondents argue, there is no basis to conclude that the minimum development area will discourage needed housing through unreasonable cost or delay. Further, respondents note that in *Home Builders Assn. of Lane County v. City of Eugene*, 41 Or LUBA 370, 422 (2002), LUBA opined that determining whether approval requirements discourage needed housing

through "unreasonable" cost or delay cannot, in most cases, be resolved in an abstract, facial challenge to a legislative decision. Respondents argue that determining whether the minimum development area requirement discourages needed housing through "unreasonable" cost or delay is better resolved in an as-applied challenge.

To the latter point, petitioner argues that no applicant will be able to challenge the minimum development area in an as-applied context, because no applicant will be able to get into an as-applied situation without meeting the minimum development area. Petitioner urges us to resolve the challenge to the minimum development area requirement, much as LUBA resolved a facial challenge to a geotechnical report requirement in *Home Builders Assn.*, 41 Or LUBA at 424.

In *Home Builders Assn.*, LUBA could resolve the facial challenge to the geotechnical report requirement, because the question of whether the requirement caused unreasonable cost or delay did not depend on factual variables. The geotechnical requirement was not tied to any approval criterion, so in every case it would serve no discernible purpose other than to cause unreasonable cost and delay. In the present case, we have no meaningful way to review petitioner's arguments that the minimum development area will, on its face, cause "unreasonable" cost or delay, because such a determination will depend on several factual variables. If a landowner takes advantage of the exception set out in the footnote to SDC 3.4-265, there may be little cost or delay at all, much less "unreasonable" cost or delay. Nor do we agree with petitioner that it will be impossible to bring an as-applied challenge to SDC 3.4-265. We see no reason why an applicant on appeal of a decision approving or denying needed housing cannot assign error or cross-assign error to application of that code provision. For the foregoing reasons, petitioner has not demonstrated that SDC 3.4-265 facially violates ORS 197.307(4).

This sub-assignment of error is denied.

The fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that adoption of Glenwood Phase 1 is inconsistent with Statewide Planning Goal 11 (Public Facilities) and its implementing rule.

Goal 11 is to "plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development. Goal 11 requires local governments to prepare public facilities plans for urban areas. The Goal 11 rule, at OAR 660-011-0005(5), defines "public facility" to include water, sewer and transportation facilities. OAR 660-011-0010(1) specifies the contents of the required public facilities plan.

The city has an acknowledged public facilities plan jointly adopted in 2001 with the City of Eugene and Lane County: the Eugene-Springfield Metropolitan Area Public Facilities and Service Plan (PFSP). In 2002, the cities and county adopted a transportation system plan, the Metro TransPlan. In 2008, Springfield adopted stormwater and wastewater master plans.

The city's findings address Goal 11 and the Goal 11 rule, and state in relevant part:

> "All of Glenwood Phase 1 is located within Springfield's Urban Growth Boundary; some properties have already been annexed to Springfield. Prior to development of any property outside of Springfield's city limits, property owners must execute an annexation agreement, which will stipulate responsibilities for provision of public services prior to annexation. Upon annexation, the following public facilities and services that are required under Goal 11 can be provided to properties within Glenwood Phase 1[.]" Record 92 (footnote omitted).

The findings then address several types of public facilities, including transportation, stormwater and wastewater, and conclude that "Glenwood Phase 1 complies with Goal 11 because existing public facilities and services either have the capacity to serve future development in Glenwood Phase 1 or future public facilities can be provided in a timely, orderly and efficient manner." Record 93.

Petitioner challenges the city's findings that Glenwood Phase 1 compiles with Goal 11 and the Goal 11 rule with respect to transportation, stormwater and wastewater facilities. We address each type of facility in turn.

A. Transportation Facilities

Glenwood Phase 1 calls for eventual redevelopment of the two arterials in the neighborhood, Franklin Boulevard and McVay Highway, and constructing a riverfront multi-use path. However, petitioner argues that the city's transportation system plan, TransPlan, does not adequately reflect these proposed transportation improvements. According to petitioner, TransPlan includes the three projects on maps of future roadway and bikeway projects, but those maps illustrate projects not planned for construction within the 20-year planning period covered by TransPlan. Further, petitioner argues that TransPlan does not include the information required by OAR 660-011-0010(1), specifically a description of the projects, rough cost estimates, estimates of when the projects will be needed, and information regarding funding mechanisms. Petitioner contends that the city's public facilities planning has not kept pace with its Glenwood land use planning.

Respondents argue that under TransPlan "future projects" such as improvements to Franklin Boulevard and McVay Highway, and the proposed riverfront path, are identified in very general terms, and then refined in more detail when the project is selected for inclusion in a short-term capital improvement project. Respondents contend that petitioner has not demonstrated that TransPlan is inadequate, or explained why any inadequacy in TransPlan can be challenged in the context of an appeal of Glenwood Phase 1.

Transportation planning is the subject of a different statewide planning goal, Goal 12. The general Goal 11 requirement to provide "timely, orderly and efficient arrangements of public facilities and services" adds little to the many specific Goal 12 planning requirements. *Setniker v. Oregon Department of Transportation*, __ Or LUBA __ (LUBA No. 2012-002, July 26, 2012), slip op 17. TransPlan, adopted in 2002, is acknowledged to comply with both

Goal 11 and 12. We agree with the city that any inconsistency or inadequacy in TransPlan cannot be challenged in the present appeal of Glenwood Phase 1. The 2002 TransPlan included all three projects in a list of future projects that will likely not be constructed within the 20-year planning period, a period which presumably ends in 2022. The Glenwood Phase 1 plan describes those projects in more detail, but petitioner does not contend that the decision proposes to construct any of the projects within TransPlan's 20-year planning period, or proposes anything inconsistent with TransPlan. Petitioner identifies nothing in Goal 11 or elsewhere that requires that TransPlan be updated concurrently with adoption of Glenwood Phase 1 to add more details about the three transportation projects identified in TransPlan, or that would allow any inadequacies in TransPlan to be challenged in the present appeal. Absent some authority to that effect, petitioner's arguments do not provide a basis to reverse or remand the Glenwood Phase 1 decision.

B. Sanitary Sewer Facilities

Much of the Glenwood neighborhood located outside city boundaries is on septic systems. The city has partially constructed a new sewer trunk line, and Glenwood Phase 1 describes an extension of that trunk line down the length of McVay Highway, which will make it possible someday to hook all properties in Glenwood Phase 1 to public sewer, as properties are annexed into the city. The trunk line extension project is listed in the city's Wastewater Master Plan, adopted by resolution in 2008. However, the extension project is not described in the PFSP, which is the Metro region's acknowledged public facilities plan.

Petitioner argues that because the Glenwood Phase 1 decision calls for the trunk line extension, but that project is not listed or described in the PFSP or any acknowledged planning document, the Glenwood Phase 1 decision does not comply with Goal 11.

Respondents argue that under the Metro Plan the PFSP is a regional public facilities plan that in relevant part is concerned only with wastewater lines that are 24 inches or larger. The city contends that the Metro Plan and the PFSP leave smaller scale wastewater facilities

such as the trunk line extension described in the city's Wastewater Master Plan to the individual cities to plan and develop. According to the city, the trunk line extension project described in the Wastewater Master Plan and referenced in the Glenwood Phase 1 decision involves only 15-inch and 8-inch wastewater lines, and therefore PFSP does not list, and is not required to list, the extension project.

Again, it is not clear to us why any alleged inadequacy in the PFSP can be challenged in an appeal of the Glenwood Phase 1 decision. In any case, as the city notes, the acknowledged PFSP defines public facilities subject to the PFSP in relevant part to include only wastewater facilities with lines 24 inches or larger. PFSP 25. For purposes of the Goal 2 consistency requirement, there is no inconsistency between the PFSP and a refinement plan that discusses a wastewater facility listed in the city's Wastewater Master Plan that involves only 15-inch lines. For purposes of Goal 11, the limited scope of the PFSP is acknowledged to comply with Goal 11. Petitioner essentially requests that the Glenwood Phase 1 decision be remanded so that the PFSP can be amended to list a facility that, as acknowledged, Goal 11 does not require the PFSP to list. That argument constitutes a collateral attack on the acknowledged status of the PFSP. Petitioner's arguments do not provide a basis to reverse or remand the Glenwood Phase 1 amendments.

C. Stormwater Facilities

Most of the stormwater collection systems in the Glenwood Phase 1 area are private; there are few public stormwater collection facilities. The city's Stormwater Master Plan identifies Glenwood as the highest priority area for public stormwater infrastructure improvements. The Glenwood Phase 1 findings regarding stormwater facilities recite that "current plans" call for constructing a minimally-sized stormwater collection system along future boulevard improvements. The PFSP lists one Glenwood stormwater project, Glenwood Channel and Pipe Improvements, Project No. 112, with an estimated cost of $4.6 million.

Petitioner argues that it is not clear that Project No. 112 listed in the PFSP will be adequate to meet all of the public stormwater facility needs of the Glenwood Phase 1 area. Petitioner contends that the description of Project No. 112 in the PFSP is too brief to determine how much of that need the project will fill.

Again, petitioner does not explain why any alleged inadequacy in the PFSP or its description of stormwater projects can be challenged in the present appeal, and petitioner's arguments are a collateral attack on the acknowledged status of the PFSP. Even if we assume that Project No. 112 is not sufficient to meet all of the need for public stormwater facilities in the Glenwood Phase 1 area, as petitioner suggests, petitioner has not explained why the adoption of the Glenwood Phase 1 Refinement Plan amendments triggers the obligation to correct alleged insufficiencies in the PFSP.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

The Transportation Planning Rule (TPR) at OAR 660-012-0060(1) provides that if a plan amendment would "significantly affect" an existing or planned transportation facility, the local government must put in place measures to mitigate the impacts. As relevant here, a plan amendment would "significantly affect" a transportation facility if within the relevant planning period the amendment would cause (1) types or levels of travel inconsistent with the functional classification of the facility, (2) degrade the performance level of the facility below the standard identified in the local transportation system plan, or (3) degrade the performance level of a facility that is projected not to meet the standard.[8] OAR 660-012-0060(1)(c).

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[8] OAR 660-012-0060(1) provides:

> "If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:

Where the amendment changes the plan or zoning designation, an initial question in addressing OAR 660-012-0060(1)(c) is whether the amendment allows uses with greater traffic-generation capacity compared to the previous plan or zone designations. If not, there may be no need for further inquiry under the TPR. If so, then further analysis is required. *Barnes v. City of Hillsboro*, 61 Or LUBA 375, 399, *aff'd* 239 Or App 73, 243 P3d 139 (2010); *Mason v. City of Corvallis*, 49 Or LUBA 199, 222 (2005).

In the present case, the city concluded that Glenwood Phase 1 complies with the TPR because the new plan and zoning designations applied allow uses that would generate less traffic compared to the previous plan and zoning designations. Petitioner challenges that conclusion, and argues that the city erred in failing to conduct further inquiry under the TPR.[9]

The city found that the previous zoning had a traffic generative capacity of 5,057 peak hour trips, but the Glenwood Phase 1 zoning had a traffic generative capacity of only 4,971

"* * * * *

"(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.

"(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

"(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or

"(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan."

[9] Petitioner notes that the city's TPR findings address the 2011 version of the TPR, instead of the version that became effective January 1, 2012, well before the respondents adopted the challenged ordinances in September 2012. However, petitioner does not assign error to failure to address the 2012 TPR or argue that the revisions make any substantive difference in this appeal. In this opinion, we will cite and quote the 2012 TPR.

peak hour trips. Initially, the city concluded that the Glenwood Phase 1 zoning had a traffic generative capacity of 5,760 peak hour trips, but the city reduced that figure to 4,971 peak hour trips, based on two reductions authorized under OAR 660-012-0060(6)(a) and (b).[10] We address petitioner's several challenges to the city's analysis below.

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[10] OAR 660-012-0060(6) provides, in relevant part:

> "In determining whether proposed land uses would affect or be consistent with planned transportation facilities as provided in sections (1) and (2), local governments shall give full credit for potential reduction in vehicle trips for uses located in mixed-use, pedestrian-friendly centers, and neighborhoods as provided in subsections (a)–(d) below;
>
> "(a) Absent adopted local standards or detailed information about the vehicle trip reduction benefits of mixed-use, pedestrian-friendly development, local governments shall assume that uses located within a mixed-use, pedestrian-friendly center, or neighborhood, will generate 10% fewer daily and peak hour trips than are specified in available published estimates, such as those provided by the Institute of Transportation Engineers (ITE) Trip Generation Manual that do not specifically account for the effects of mixed-use, pedestrian-friendly development. The 10% reduction allowed for by this section shall be available only if uses which rely solely on auto trips, such as gas stations, car washes, storage facilities, and motels are prohibited;
>
> "(b) Local governments shall use detailed or local information about the trip reduction benefits of mixed-use, pedestrian-friendly development where such information is available and presented to the local government. Local governments may, based on such information, allow reductions greater than the 10% reduction required in subsection (a) above;
>
> "(c) Where a local government assumes or estimates lower vehicle trip generation as provided in subsection (a) or (b) above, it shall assure through conditions of approval, site plans, or approval standards that subsequent development approvals support the development of a mixed-use, pedestrian-friendly center or neighborhood and provide for on-site bike and pedestrian connectivity and access to transit as provided for in OAR 660-012-0045(3) and (4). * * *; and
>
> "(d) The purpose of this section is to provide an incentive for the designation and implementation of pedestrian-friendly, mixed-use centers and neighborhoods by lowering the regulatory barriers to plan amendments which accomplish this type of development. The actual trip reduction benefits of mixed-use, pedestrian-friendly development will vary from case to case and may be somewhat higher or lower than presumed pursuant to subsection (a) above. The Commission concludes that this assumption is warranted given general information about the expected effects of mixed-use, pedestrian-friendly development and its intent to encourage changes to plans and development patterns. * * *"

A. Consistent Assumptions Regarding Buildout

Petitioner first argues that the city inconsistently assumed that all vacant and redevelopable land under current zoning would be fully built-out during the planning period, while assuming that only partial build-out would occur under the new zoning. The city's findings cite, as the basis for this differential assumption, uncertain timing of transportation improvements and "current economic conditions and forecast recovery." Record 108. However, petitioner argues that there is no reason to believe that the same uncertainty and economic limitations would not also impact development under the current zoning. According to petitioner, there is no basis in the record for the city's assumption that land under the current zoning will be fully developed, while land under proposed zoning will only partially develop within the planning period.

The city responds that it is reasonable to assume only partial build-out under the new zoning, given current economic conditions, tenuous recovery forecast and "various challenges of redevelopment in Glenwood, such as lending practices for mixed-use projects, significantly higher residential densities, and other areas that will seek allocation of the future populations and employment." Response Brief 67. The city argues that it makes sense to assume full build-out under the old zoning, "given the simplified steps for development with less mixed-use and lower residential densities[.]" *Id.* Finally, the city argues that "the transportation experts agreed there was a reasonable basis for the baseline worst case assumption that the old zoning designations would fully develop, but the new designations will only partly redevelop within the planning period." *Id.*

We agree with petitioner that the city has not established a basis in the record to assume full build out under the old zoning, but only partial build out under the new zoning. All of the considerations cited in the findings to justify only partial build out under the new zoning (timing of transportation improvements, general economic conditions,) would seem to apply equally to development under the old zoning. In its response brief, the city suggests

additional bases for differential build-out assumptions, such as "lending practices for mixed-use projects" and "simplified steps for development with less mixed-use" under the old zoning. *Id.* However, the city does not cite to anything in the record to support that suggestion. The city also suggests that the "transportation experts" have agreed that the differential build-out assumptions are reasonable. However, again, the city does not cite to any support in the record for that claim. At Response Brief 66 the city provides a string cite covering hundreds of pages of the record in five volumes, for the limited proposition that the TPR transportation analyses were reviewed by a number of experts, staff, planning commissions and governing bodies. It is possible that support for the differential build-out assumptions can be found in the cited record portions, but the city does not make that claim, and without some assistance from the city we decline to comb through the record to find support.

In sum, we agree with petitioner that remand is necessary for the city to explain or find support in the record for assuming full build out under the old zoning, but only partial build-out under the old zoning. This sub-assignment of error is sustained.

B. OAR 660-012-0060(6)(a) Ten Percent Reduction

As noted, OAR 660-012-0060(6)(a) allows the city to reduce by 10 percent the estimated amount of traffic generated under the new zoning, for "uses located within a mixed-use, pedestrian-friendly center, or neighborhood[.]" However, OAR 660-012-0060(6)(a) provides that "[t]he 10% reduction allowed for by this section shall be available only if uses which rely solely on auto trips, such as gas stations, car washes, storage facilities, and motels are prohibited."

The examples of proscribed uses in OAR 660-012-0060(6)(a) includes "motels." Petitioner argues that the city cannot employ the reduction authorized by OAR 660-012-0060(6)(a), because the new Commercial Mixed-Use and Office Mixed-Use zones allow

"hotels," which petitioner argues are the fungible equivalent of motels. Petitioner notes that the SDC defines hotels and motels as the same thing.[11]

The city disputes that hotels are the equivalent of motels for purposes of OAR 660-012-0060(6)(a). The city notes that under the new mixed-use zones motels and similar auto-oriented uses are prohibited, consistent with OAR 660-012-0060(6)(a). According to the city, the ITE Trip Generation Manual, the standard resource used to estimate traffic impacts, categorizes hotels and motels differently, because hotels typically have additional facilities such as restaurants, lounges, meeting and banquet halls, etc., while motels are typically auto-oriented uses intended to serve only the needs of the motoring public. Because of those differences, the city argues that hotels should not be included with motels in the category of "uses which rely solely on auto trips" for purposes of OAR 660-012-0060(6)(a).

We agree with the city. The examples listed in OAR 660-012-0060(6)(a), "gas stations, car washes, storage facilities, and motels" appear to share a common trait of providing services to motorists or otherwise playing little function in the mixed-use, "pedestrian-friendly center" contemplated by OAR 660-012-0060(6)(a). Notwithstanding that SDC 6.1-110 defines hotels and motels together, the proposed mixed-use zones distinguish between motels, which are prohibited along with a number of other auto-oriented uses, while allowing hotels, which under the new zones include various sub-types of lodgings such as "inns, bed and breakfasts, guesthouses," and residential, limited or full-service hotels. Record 391-92. Under the new zones, hotels constitute a different and a more complex category of use than motels, and one that appears to be much more consistent with a mixed-use, pedestrian-friendly center. And, as the city notes, the standard trip general manual treats

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[11] SDC 6.1-110 states:

> "**Hotel/Motel**. Any building or group of buildings used for transient residential purposes containing guest rooms used for sleeping purposes. No more than 50 percent of the rooms may contain kitchen facilities."

the two uses differently for purposes of estimating trip generation potential. Accordingly, we disagree with petitioner that the provision for hotels disqualifies the city from taking the 10 percent trip generation reduction authorized by OAR 660-012-0060(6)(a). This sub-assignment of error is denied.

C. OAR 660-012-0060(6)(b) Additional Reduction

OAR 660-012-0060(6)(b) authorizes local governments to further discount trip generation in mixed-use, pedestrian-friendly areas, if "detailed or local information about the trip reduction benefits of mixed-use, pedestrian-friendly development" is available and presented to the local government. *See* n 10. The city's findings cite a recent study of the trip reduction benefits for mixed-use transit-oriented development from the Portland Metro area showing potential 30 to 50 percent reductions, which the city used in part to justify an additional 10 percent trip generation reduction, for a total reduction of 20 percent.[12]

However, petitioner argues that the Portland Metro study the city relied upon is not in the record and therefore does not provide evidentiary support for the additional 10 percent reduction.

Respondents do not dispute that the Portland Metro study is not in the record, but argue that the city's justification for the additional reduction relied on more than the cited

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[12] The city's findings state, in relevant part:

> "A recent study of the trip reduction benefits for mixed use transit oriented development utilizing case studies from the Portland Metro area has demonstrated potential 30% to 50% trip reductions. This study, 'TCRW Report 128, Effect of TOD [transit-oriented development] on Housing, Parking and Travel,' provides relevant analysis which closely matches the characteristics of proposed Glenwood Phase 1. The proposed refinement plan update incorporates many of the cited criteria within the TCRP study * * *
>
> "Given the trip reduction standards, incentives, prohibited land uses, and planned multimodel improvement projects specified as part of Glenwood Phase 1 and the existing adopted transportation plans referenced above, Springfield reasonably assumes that the overall trip reduction benefits for Subareas A, B and C far exceed the baseline 10 percent credit provided for in OAR 660-012-0060(6)9a). In fact it is most likely that based on the TCRP-Report 128, and additional supporting analyses in ITE Trip Generation Handbook (3) for mixed use and TOD, the Glenwood Riverfront as a whole will ultimately realize a net vehicle trip reduction between 30 and 50 percent." Record 110-11.

Portland Metro area study, and also relied on incentives, policies, implementation strategies and standards to be used in the Glenwood Phase 1 area that are designed to reduce reliance on auto use and vehicle miles traveled.

The city's findings appear to rely substantially on the Portland Metro study to confirm that the Glenwood Phase 1 strategies would reduce automobile use. We cannot tell from the findings that, absent reliance on the study, the city would have adopted the additional 10 percent reduction, or a different reduction. Because the decision must be remanded in any event under this assignment of error, remand is also warranted for the city to either place the study in the record or adopt findings justifying the 10 percent reduction without reliance on the study. This sub-assignment of error is sustained.

D. Nodal Development

As noted, the existing GRP included a riverfront site of approximately 52 acres that is designated for nodal development, a type of mixed-use pedestrian-friendly development pattern. Glenwood Phase 1 designates a total of 123 acres for nodal development. Part of the city's justification for the trip reductions under OAR 660-12-0060(6)(a) and (b) was the fact that Glenwood Phase 1 proposes 123 acres of nodal areas.

Petitioner argues that the city's comparison of trip generation potential between the old and new zoning is erroneous, because the city's estimate of trip generation potential under the old zoning did not assume a trip reduction discount for the existing 52 acre nodal area. Petitioner notes that when the city adopted the 52 acres of nodal zoning in 2005, the city's TPR analysis at that time granted a 10 percent trip reduction due to the nodal areas. According to petitioner, the city's trip generation comparison must employ consistent assumptions, and absent an explanation for why nodal development under the new zoning warrants a reduction, but nodal development under the old zoning does not, remand is warranted to apply the appropriate reduction for trips generated in nodal areas under the old zoning. Under any such analysis, petitioner argues, the old zoning would likely generate less

traffic than the new zoning, which means the city would be required to conduct a further TPR analysis.

Respondents argue that different development standards apply between the 52 acre nodal areas zoned in 2005, and the 123 acres zoned in the present decision, and those differences warrant applying a reduction under the new zoning but not under the old. Respondents point out, as an example, that the old zoning had a minimum density of 12 dwelling units per acre, but the new zoning has a minimum density of 50 dwellings per acre. According to respondents, higher density increases the trip reduction benefits.

There may or may not be some basis in the record to apply *different* trip reduction percentages to nodal development under the old zoning versus under the new zoning for purposes of OAR 660-012-0060(6)(a) and (b), but the findings and record do not establish a basis to apply *no* trip reduction at all to nodal development under the old zoning. As petitioner notes, the city applied a 10 percent trip reduction rate when adopting the old zoning in 2005. If there is an adequate factual basis in the record to assume a zero trip reduction rate under the old zoning when comparing the traffic generative potential of the old and new zoning, respondents have not identified it. Remand is necessary for the city to consider the issue. This sub-assignment of error is sustained.

E. Contingent Measures to Ensure Compliance with the TPR

The challenged decision found compliance with the TPR, based on the conclusion that the traffic generative potential of the new zoning is less than the old zoning. As a precaution, however, the city also required that, if development proposed under the new zoning in fact exceeds the estimates, the developer "will be responsible to make further determinations of significant effect as required by the TPR in effect at the time of the proposed development[.]" Record 247. Petitioner contends that this contingent approach is not consistent with the TPR.

In *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 220 P3d 445 (2009), the Court of Appeals held that TPR compliance must be determined at the time of the plan amendment, and compliance determination cannot be deferred to a later stage that does not involve a plan amendment. Petitioner argues that the same principle should forbid the contingent approach the city adopted here. According to petitioner, the city should not shift onto the shoulders of a developer who is proposing development under the new zoning a requirement to demonstrate that the TPR is satisfied; it is the city's obligation to determine that the TPR is satisfied when the city adopts the new zones.

Respondents argue, and we agree, that it is not inconsistent with the TPR to find, based on an adequate factual base, that plan and zoning changes are consistent with the TPR because the changes do not exceed the planned traffic-generative potential, yet to adopt measures to ensure that actual development under the new plan or zoning designations do not exceed those planned potentials. While such measures cannot substitute for the required TPR analysis and cannot backstop an inadequate TPR analysis, we see no error or violation of the TPR in adopting such measures. *See Central Oregon Landwatch v. Deschutes County*, __ Or LUBA ___ (LUBA No. Nos. 2011-115/116), September 6, 2012) slip op 15-16 (requiring the applicant to conduct a second TPR analysis at the time of development does not violate the TPR). In the present case, we have held above that remand is necessary for the city to evaluate several identified inadequacies in the TPR analysis or the record supporting that analysis. While the city's precautionary measures cannot save the city from remand, we disagree with petitioner that adoption of those measures are in themselves erroneous or warrant remand.

The sixth assignment of error is sustained, in part.

SEVENTH ASSIGNMENT OF ERROR

Petitioner contends that a 75-foot setback from the Willamette River adopted in the challenged decisions was not adopted in accordance with Statewide Planning Goal 15 (Willamette River Greenway).

Goal 15 and the Goal 15 rule require state and local governments to "protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River as the Willamette River Greenway." OAR 660-015-0005. Petitioner argues that (1) the city failed to consider the acknowledged Greenway inventory when establishing the Greenway setback; (2) the Greenway regulations allow uses within the setback that are neither water-dependent nor water-related; and (3) the refinement plan diagram and proposed zoning maps fail to show the location of the 75-foot setback. We address each argument in turn.

A. Inventory

Goal 15, Paragraph B, requires the city to inventory certain features of land to determine which properties to include within the Greenway boundary, and to develop the plans and management and acquisition programs." [13] In the 1980s, the city and other jurisdictions adopted a Goal 15 program as part of the Metro Plan, and that program was acknowledged.

Goal 15, Paragraph C.3.k requires local governments to establish a setback from the River, in which only water-dependent and water-related uses are allowed.[14] However,

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[13] Goal 15, Paragraph B provides:

> "Information and data shall be collected to determine the nature and extent of the resources, uses and rights associated directly with the Willamette River Greenway. These inventories are for the purpose of determining which lands are suitable or necessary for inclusion within the Willamette River Greenway Boundaries and to develop the plans and management and acquisition programs."

[14] Goal 15, Paragraph C.3.k provides:

Paragraph C.3.k does not specify the required extent of the setback. Under the acknowledged GRP, the setback within the Glenwood riverfront area is 20 to 35 feet from the top of the bank, unless the location of the floodway boundary required greater separation from the river. Under that program, the actual setback was determined on a case-by-case basis as each parcel within the Greenway boundary was developed or redeveloped. The findings discuss a 2005 decision that determined the setback on a particular property in the Glenwood Riverfront, based on a survey showing the existing riparian vegetation line. Record 120. However, the findings state that except for that property, no other specific setback has been determined in the Glenwood Riverfront. *Id.*

In the challenged decision, the city adopted a uniform 75-foot setback from the River for areas within Glenwood Phase 1. The city's rationale for adopting the uniform 75-foot setback is that there already exists a 75-foot riparian setback, required under federal law and the city's Goal 5 program:

> "Under existing regulations, a Greenway Setback Line must be established for each proposed development within the [Willamette Greenway] Overlay District in the Glenwood Riverfront. This will add additional cost and time to the developer. Since there is an established 75-foot riparian setback along the Willamette River along the Glenwood Riverfront and since Goal 15 requires the protection of 'Significant natural and scenic areas, and vegetative cover' a concurrent 75-foot Greenway Setback Line is proposed both in the Glenwood Refinement Plan Open Space Chapter and in the Glenwood Riverfront Mixed-Use Plan District, Section 3.4-280 so that both setbacks can be established at the same time." Record 121 (bold and italics omitted).

However, petitioner argues that Paragraph C.3.k requires that the setback be based upon the Goal 15 *inventory* of resources, uses and rights, not the convenience of using an already existing setback, or the assumption that that existing setback includes inventoried or uninventoried Goal 15 resources to be protected. According to petitioner, remand is

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> "A setback line will be established to keep structures separated from the river in order to protect, maintain, preserve and enhance the natural, scenic, historic and recreational qualities of the Willamette River Greenway, as identified in the Greenway Inventories. The setback line shall not apply to water-related and water-dependent uses."

necessary for the city to base the Greenway setback on the acknowledged inventory or, if the existing inventory is inadequate to locate the setback, to adopt a more adequate inventory.

Petitioner is correct that Paragraph C.3.k requires the setback to be established to "protect, maintain, preserve and enhance" certain "qualities of the Willamette River Greenway, *as identified in the Greenway Inventories*." (emphasis added). We agree with petitioner that Paragraph C.3.k requires that the acknowledged inventory be considered when adopting the setback. Presumably, the initial or provisional setback of between 20 to 35 feet was based on an acknowledged inventory, but nothing in the findings or record cited to us suggests that the 75-foot uniform setback adopted in the challenged decision was based on the acknowledged inventory.

Respondents argue that the decision to adopt a uniform 75-foot setback involved consideration of the acknowledged Goal 15 inventory. However, respondents do not cite to anything in the record or findings that suggest that the acknowledged inventory was considered in adopting the 75-foot setback.[15] The only reference to an inventory in the record to which respondents cite is a staff response to a letter submitted by petitioner's attorney dated June 4, 2012, stating, "[r]egarding the Greenway inventory, an inventory of affected land was completed during the preparation of the riparian protections regulations adopted in 2002." Record 1107. However, that statement does not make it clear that the city considered the acknowledged *Greenway* inventory in adopting the 75-foot Greenway setback. Instead, as noted, the 75-foot setback was apparently chosen because it coincided with a separate 75-foot setback adopted to comply with other laws.

[15] On June 26, 2013, respondents provided the Board with copies of the city's ordinances adopted to implement Goal 15. Included in those materials was an ordinance approving the Greenway boundary, as well as the LCDC Compliance Acknowledgement Order establishing that "the area within the Urban Growth Boundary of Eugene/Springfield/Lane Metro comprehensive plan and implementing measures comply with the Statewide Planning Goals." Appendix A, C. However, these additional materials do not assist in resolution of what constitutes the acknowledged Greenway inventory and whether the city considered the Greenway inventory when establishing the 75-foot setback.

The first sub-assignment of error is sustained. This issue is remanded to the city to demonstrate that the setback is based on protection of resources identified in the city's acknowledged Greenway inventory.

B. Water-Dependent and Water-Related Uses

Goal 15, Paragraph C.3.k provides that "[t]he setback line shall not apply to water-related or water-dependent uses." The challenged decision adopts SDC 3.4-280(D)(2), which allows within the 75-foot setback area only water-dependent or water-related uses. SDC 3.4-280(D)(2) then provides a non-exclusive list of uses or infrastructure allowed in the setback, including public multi-use paths, access ways, pedestrian trails and walkways, boardwalks, picnic areas, interpretative and educational displays, overlooks and viewpoints, and bridges and related appurtenances for pedestrians, bicycles and motor vehicles. Petitioner argues that none of the above-mentioned uses qualify as water-dependent or water-related uses, because they can be sited anywhere and need not be adjacent to water.

"Water-related" uses are defined in the Statewide Planning Goals as follows:

> "Uses which are not directly dependent upon access to a water body, but which provide goods or services that are directly associated with water-dependent land or waterway use, and which, if not located adjacent to water, would result in a public loss of quality in the goods or services offered. Except as necessary for water-dependent or water-related uses or facilities, residences, parking lots, spoil and dump sites, roads and highways, restaurants, businesses, factories, and trailer parks are not generally considered dependent on or related to water location needs." Oregon's Statewide Planning Goals, Definitions 9.

Respondents argue that SDC 3.4-280(D)(2) limits uses allowed within the setback to water-dependent or water-related uses, and all of the uses listed in SDC 3.4-280(D)(2) are, or can be, water-dependent or water related. Respondents note SDC 3.4-280(G) requires a discretionary Type III review for all development proposed within the setback, and argue that the city will evaluate particular uses proposed within the setback and allow only those that the city determines are water-dependent or water-related.

We agree with respondents that all or nearly all of the use examples listed in SDC 3.4-280(D)(2) and challenged by petitioner can qualify as water-related uses. The test under the Goal 15 definition of water-related uses is not whether the use can be sited elsewhere, but whether the use provides "goods or services that are directly associated with water-dependent land or waterway use, and which, if not located adjacent to water, would result in a public loss of quality in the goods or services offered." That definition is broad enough to include waterfront paths, boardwalks and similar facilities that provide public access to and along the waterfront, at least in the abstract. It is broad enough to include interpretative and educational displays that concern the waterfront, and picnic areas, overlooks and viewpoints for public enjoyment of the waterfront. It may be that particular proposed public facilities do not qualify as water-related uses. Petitioner notes that the city recently took a Goal 15 exception for part of a bike path within the Greenway. However, that illustrates the respondents' point, that the city has review processes in place that allow the city to determine whether particular proposed uses within the setback qualify as water-dependent, water-related, or neither.

The only listed example that seems particularly problematic is "[b]ridges and related appurtenances for pedestrians, bicycles and motor vehicles." The definition of "water-related uses" states that "roads and highways" do not fall within the definition, unless necessary for water-dependent or water-related uses or facilities. Petitioner argues that the city has recently taken a Goal 15 exception for a new Interstate Highway bridge over the river, and argues that all bridges in the setback would similarly require exceptions. Petitioner may be correct that some bridges will not qualify as a water-related use, but we disagree with petitioner's categorical argument that no bridge could possibly qualify as a water-related use. And, again, the highway bridge example that petitioner cites to demonstrates that the city has a review process in place to ensure that uses that do not qualify for water-dependent and water-

related uses under the Goal 15 definitions will not be allowed in the setback without an exception.

The second sub-assignment of error is denied.

C. Refinement Plan and Proposed Zoning Map

Petitioner argues that the location of the 75-foot Greenway setback should be shown on the Metro Plan Diagram, the current or proposed Glenwood Refinement Plan, or the proposed zoning maps.

Goal 15 requires that the Greenway "boundaries" be shown on every comprehensive plan as well as on city and county zoning maps. Petitioner asserts that the use of the plural in the term "boundaries" means that this requirement applies to both the outer boundary of the Greenway as well as to the Greenway setback. We disagree. The Greenway always has two boundaries, one on each side of the river, so use of the plural does not suggest an intent to conflate the terms "boundary" and "setback." While the goal requires that Greenway boundaries "be shown on every comprehensive plan" (E.1) and "on city and county zoning maps" (F.1), it requires only that setbacks "be established." (C.3.k). Had the goal drafters intended that setbacks, in addition to boundaries, be shown on comprehensive plans and zoning maps, they could have provided language to that effect in Goal 15.

The third sub-assignment of error is denied.

The seventh assignment of error is sustained, in part.

EIGHTH ASSIGNMENT OF ERROR

The city has adopted a document entitled "Engineering Design Standards and Procedures Manual" or EDSPM. The EDSPM is defined at SDC 6.1-110 as "[a] document containing design standards and procedures prepared by the Public Works Department and adopted by resolution of the City Council." The design standards apply to public and private infrastructure improvements, such as transportation, sanitary sewer, and stormwater management systems.

Petitioner argues that the EDSPM plays a critical role in the city's land use regulatory scheme. The Glenwood Phase 1 amendments reference the EDSPM in a number of places.[16] Based on those references, petitioner contends that EDSPM qualifies as a "land use regulation" as that term is defined at ORS 197.015(11), because the EDSPM establishes "standards for implementing" the Glenwood Phase 1 refinement plan.[17] The EDSPM was adopted by resolution, not by ordinance as specified in ORS 197.015(11). However, petitioner argues that the form of adoption is immaterial; what is important is that the EDSPM implements Glenwood Phase 1, a comprehensive plan. According to petitioner, because the EDSPM was not adopted by ordinance and pursuant to the post-acknowledgment plan process, the EDSPM is not acknowledged. Therefore, petitioner argues, Glenwood

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[16] Petitioner cites to several examples from the Glenwood Phase 1 amendments, including:

> "Implementation of GRP policies is enabled through Springfield Development Code ordinances and other municipal rules and regulations, such as those detailed in Springfield's [EDSPM]." Record 209.
>
> "The last year of the Phase 1 process was spent preparing the policy and regulatory documents for the Phase 1 GRP update, including drafting the chapters of the GRP and the Springfield Development Code and [EDSPM] amendments necessary to enable implementation of the plan." Record 215.
>
> "Update the Conceptual Local Street Map, the [EDSPM] and the Springfield Standard Construction Specifications regarding the Franklin Riverfront Local Street Network improvements to enable implementation of the Plan transportation policies and implementation strategies." Record 268.
>
> "Incorporate into the Glenwood Mixed-Use Riverfront Plan District and the Springfield EDSPM, as appropriate, riverfront/river bank design concepts for developing an urban river's edge * * *." Record 294.
>
> "Hillside protection as a natural resource is regulated by the [SDC] and in the Springfield EDSPM." Record 296.
>
> "To the extent practicable, amend the [SDC] and the Springfield [EDSPM] to facilitate the use of LID [Low Impact Development] techniques to achieve stormwater quality and optimal capacity management." Record 341.

[17] ORS 197.015(11) defines "land use regulation" as "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

Phase 1 violates Goal 2, because it references and relies upon unacknowledged land use regulations. Petitioner contends that the city's only choices are to (1) remove the references to the EDSPM in the GRP and implementing SDC provisions, or (2) adopt the EDSPM by ordinance through the acknowledgment process.

Respondents argue that the EDSPM was in fact adopted by ordinance and is an acknowledged land use regulation. According to respondents, in 2007 the city adopted by ordinance amendments to its land use code that reference the EDSPM. Respondents contend that such references are sufficient to adopt the EDSPM as part of the city's acknowledged land use code. Similarly, respondents argue that references in the SDC to the structural specialty code, fire codes, and the federal Americans With Disabilities Act are sufficient to incorporate those codes and acts into the SDC, and render those codes and acts acknowledged land use regulations as if fully set forth in the acknowledged SDC.

Petitioner replies, and we agree, that mere references to a document in an acknowledged land use regulation is not a sufficient basis to conclude that the referenced document is thereby incorporated into the acknowledged land use regulation or is otherwise a document that has been acknowledged to comply with the statewide planning goals. The process to gain acknowledgment for amendments to comprehensive plan and land use regulations is set out in ORS 197.610 *et seq*. and OAR Chapter 660, division 018, which impose notice and other procedural and substantive steps. OAR 660-018-0020(3) requires that the notice "include all of the proposed wording to be added to or deleted from the acknowledged plan or land use regulations." That requirement is intended to provide the public and the Department of Land Conservation and Development a meaningful opportunity to review and comment on the proposed amendments, which in turn requires some certainty about precisely what language is being added or deleted. In our view, adopted plan or code language that merely *references* other documents—such as an engineering manual, a traffic manual, fire codes, the state structural specialty code, or other statutes or laws—does not

suffice to include or incorporate those referenced documents into the amended plan or code, and thereby gain acknowledgment for the referenced documents. Respondents cite no authority for the contrary proposition, and we are aware of none.

However, on the merits we disagree with petitioner that it is necessarily inconsistent with Goal 2 for the city to adopt a refinement plan that includes references to technical engineering manuals such as the EDSPM, unless such manuals are adopted via the post-acknowledgment plan amendment procedures and become acknowledged. The premise for petitioner's Goal 2 argument is that the EDSPM qualifies as a "land use regulation" as defined at ORS 197.015(11), because it "implements" the Glenwood Phase 1 amendments to the GRP, a comprehensive plan. That premise is questionable. For one thing, the EDSPM was originally adopted in 2002, long before the amendments to the GRP challenged in this appeal. Under petitioner's theory, the EDSPM was not a "land use regulation" until the GRP amendments were adopted, at which time the references to the EDSPM in the amended GRP had the effect of transforming the EDSPM into a land use regulation. It is difficult to understand how the existing EDSPM could establish standards for "implementing" GRP amendments that did not exist when the EDSPM was adopted.

Further, we note that most of the references to the EDSPM cited by petitioner are references to *future* updates to the EDSPM. *See* n 16. The findings state that the updated EDSPM will be adopted either concurrently or within a month of adoption of Glenwood Phase 1. Record 101. The parties do not inform us whether the updated EDSPM was concurrently or subsequently adopted and if so, pursuant to what process. Assuming without deciding that the updates "implement" the GRP amendments, and thus the updated EDSPM would qualify as a land use regulation, petitioner may be correct that the city should adopt the updated EDSPM via the post-acknowledgment plan process. If the city fails to do so, petitioner is free to appeal to LUBA the decision adopting the updated EDSPM and challenge the alleged error. However, the decision before us amends the GRP. It is not clear why

petitioner believes that it violates Goal 2 for the city to adopt language in the amended GRP that references future updates to the EDSPM. It is frequently the case that local governments will first adopt comprehensive plans, and then later adopt implementing regulations. Under petitioner's apparent theory, the comprehensive plan could not refer to any future implementing regulations without violating Goal 2.

Even assuming that the EDSPM is now or will qualify as a "land use regulation" by virtue of the Glenwood Phase 1 amendments, the problem petitioner identifies is that the EDSPM was not adopted as an ordinance, pursuant to the post-acknowledgment plan amendment procedures required for adopting a land use ordinance, and hence is not an acknowledged land use regulation. That may constitute a problem for the city in adopting or applying the EDSPM, but it is not clear to us why petitioner believes that Goal 2 prohibits the city from adopting *plan amendments* that reference unacknowledged existing or future land use regulations. Petitioner cites no authority to that effect, and we are aware of none. Petitioner cites no language in Goal 2 that prohibits the city from adopting a comprehensive plan that references unacknowledged land use regulations. If there is a Goal 2 problem, it is with the EDSPM, not Glenwood Phase 1. Remanding Glenwood Phase 1 would do nothing to correct the unacknowledged status of the EDSPM. Petitioner's arguments under this assignment of error do not provide a basis to reverse or remand Glenwood Phase 1.

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

The challenged ordinances adopt SDC 3.3-230, which authorizes the planning director to require the applicant for a "major modification" to the Glenwood Riverfront Mixed-Use Plan District, building design standards or an amendment to the GRP to submit to a "peer review" process. The director may require peer review in two circumstances, including when city staff do not have the expertise to evaluate a required technical report. The peer review is performed by engineers, planners and other professionals, at the

applicant's expense, and must be submitted at the time of the pre-application conference required for a major modification. SDC 3.3-230(B) describes four kinds of "major modifications," and those modifications are essentially variances or adjustments to certain types of otherwise applicable standards.[18]

Petitioner argues that the peer review requirement violates the needed housing statute at ORS 197.307(4), because it unreasonably delays the provision of needed housing. Petitioner also contends that the requirement for the applicant to pay for pre-application peer review violates ORS 227.175(1), which authorizes a governing body to establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service.[19] According to petitioner, ORS 227.175(1) prohibits the city from imposing the cost of paying for the peer review service, in a manner that separates it from the formal city processing of the permit. Petitioner argues that only if the city provides the peer review service during its processing can the city require an applicant to pay for it.

Respondents argue, and we agree, that SDC 3.3-230 does not violate ORS 197.307(4). The peer review requirement only applies when the applicant is seeking a "major modification" to a GRP standard, and such a modification is, in essence, a variance to an otherwise applicable standard. ORS 197.307(4) is concerned with the "standards, conditions and procedures" regulating the approval or denial of needed housing allowed as a permitted use under the acknowledged comprehensive plan and zoning districts. Such "standards,

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[18] SDC 3.4-230(B) provides that major modifications are those that result in (1) a change in more than 20 percent to a quantified building design standard, (2) a change that requires relocation of a planned street or transportation facility, (3) an alternative to a development standard, or (4) any other modification to a standard not specifically listed as a minor or major modification.

[19] ORS 227.175(1) provides:

> "When required or authorized by a city, an owner of land may apply in writing to the hearings officer, or such other person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes. The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service."

conditions and procedures" must be clear and objective and cannot have the effect of discouraging needed housing through unreasonable cost or delay. However, ORS 197.307(4) does not apply when an applicant seeks to modify or vary one of the applicable needed housing standards. *See Home Builders Assoc.*, 41 Or LUBA at 400 (a city may provide a needed housing applicant with a choice between meeting a clear and objective standard by complying with its terms or by obtaining a discretionary variance or adjustment to that standard without offending ORS 197.307(4)); *Linstromberg v. City of Veneta*, 47 Or LUBA 99, 108-09 (2004) (ORS 197.307(4) does not require that a variance standard to an approval criterion for needed housing be clear and objective). Because a needed housing applicant can always choose to comply with needed housing standards without seeking a major modification, the peer review process is not subject to the ORS 197.307(4) prohibition on unreasonable cost or delay.

We also agree with respondents that the authorization to require peer review for major modifications does not violate ORS 227.175(1), which authorizes local governments to establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service. The purpose of the peer review process is to provide the city with technical and other information necessary to process the permit. It is not materially different from requiring the applicant to submit a required traffic study or other required application information. ORS 227.175(1) does not prohibit the city from requiring the applicant to undertake and submit, as part of the pre-application process, a peer-reviewed analysis. The first sentence of ORS 227.175(1) broadly grants city governing bodies the authority to prescribe the forms and "manner" in which applications are made. *See* n 19. The second sentence simply authorizes the city to establish a fee for services the city provides in processing an application, but does not limit the city's ability to require submission of information that is gathered at the applicant's expense.

The ninth assignment of error is denied.

The city's decision is remanded.

Ryan, Board Member, concurring.

I concur with the majority's reasoning and result, but I write separately because I respectfully disagree with the majority's resolution of the ninth assignment of error. The ninth assignment of error challenges SDC 3.4-230.C and .D. SDC 3.4-230.C allows the planning director to require "a peer review" for a Major Modification in certain circumstances. SDC 3.4-230.D describes "Peer Review" and provides that it must be (1) submitted at the time of the Pre-Submittal meeting and (2) at the applicant's expense.

ORS 227.175(1) provides:

> "When required or authorized by a city, an owner of land may apply in writing to the hearings officer, or such other person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes. The governing body shall establish fees charged *for processing permits* at an amount no more than the actual or average cost of providing that service." (Emphasis added.)

The ninth assignment of error alleges that the plain language of ORS 227.175(1) prohibits the city from charging an applicant for fees incurred for Peer Review, because SDC 3.4-230.D requires that Peer Review be submitted before a permit application has been filed, at the time of the Pre-Submittal meeting. Accordingly, petitioner argues, the fee is not a "fee[] charged for processing permits * * *," where no permit application has been filed. As petitioner succinctly puts it, "[i]f the local government does not provide the service during its processing then there can be no charge." Petition for Review 75. Petitioner points out that conducting peer review during the processing of the permit application would also entitle the applicant to a decision within 120 days of its application being deemed complete under ORS 227.178(1).

The majority relies on the broad authority of local government to prescribe the "* * * manner" in which applications are made. However, in my view the broad language in ORS 227.175(1) is still linked to and requires an *application* for a permit, and does not provide

authority for the city to charge for Peer Review fees that are incurred at the time of a required Pre-Submittal meeting, before an application is filed. For that reason, I would also sustain petitioner's ninth assignment of error.